Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-608

RELIANCE INSURANCE COMPANY,
Petitioner,

VERSUS

DEBOER CONSTRUCTION, INC. and
THE INSURANCE CENTER, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals, Tenth Circuit

BRIEF FOR RESPONDENT THE INSURANCE CENTER, INC., IN OPPOSITION

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November, 1976

UTTERBACK TYPESETTING CO. 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

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OPINION BELOW

The opinion of the court below in DeBoer Construction, Inc. v. Reliance Ins. Co., et al., is now reported in 540 F.2d 486 (10th Cir. 1976), and is appended to the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

Petitioner has submitted four questions for consideration by this Court. Three of such questions are directed toward the affirming of a partial judgment in favor of Respondent DeBoer Construction Company and against Peti-

tioner only; and only one, namely, the denial of indemnity for Petitioner against The Insurance Center, Inc., is applicable to this respondent.

For the purpose of this petition, the actual issues as to this respondent are:

1. Should this Court review and overturn the concurrent findings of two lower federal courts that Winfrey was the agent of Reliance in this action.

2. Should this Court review and overturn the findings of the court below that Reliance is not entitled to indemnity from Insurance Center for wrongful acts of Reliance's agent Winfrey by contract or otherwise.

STATEMENT OF THE CASE

In this response, the Petitioner, Reliance Insurance Company, will be referred to as Reliance; Respondent, DeBoer Construction, Inc., as DeBoer; and this Respondent, The Insurance Center, Inc., as Insurance Center.

Petitioner's statement of the case is substantially correct as relates to DeBoer and the partial judgment affirmed by the court below. However, as relates to the issues of Petitioner's right of indemnity against Respondent Insurance Center, the Petitioner's statement of facts is inaccurate, incomplete and misleading.

As pertinent herein, Winfrey was a licensed insurance agent for Petitioner Reliance and other insurance companies. Although he worked at The Insurance Center along with other insurance agents under an employment contract,

Winfrey was directly appointed by Reliance as its attorney-in-fact with limited powers of attorney of Reliance under a separate written agreement (letters of limitation) with Reliance. In such agreement, Winfrey agreed with Reliance not to issue construction bonds without prior approval of Reliance.

It was the unauthorized and fraudulent misuse of Winfrey's power of attorney from Reliance (limited to $500,000.00, but attached to a bogus $925,000.00 construction bond), which was the basis of DeBoer's claim for damages, and violated the agreements between the agent Winfrey and his principal, Reliance.

Petitioner also failed to state that The Insurance Center did not issue the subject bogus bond, did not authorize any such bond, did not know of such bond, did not ratify such bond, and did not receive any benefit from the issuance of such bond; and both the trial court and Court of Appeals so found.

The Court of Appeals had before it, as a part of the record, the contract and agreement wherein Reliance appointed Winfrey as its agent (attorney-in-fact), the agency contract between Reliance and The Insurance Center, and the employment contract between Winfrey and Insurance Center (the latter relating to administration duties within the agency and not to the issuance of powers of attorney or construction bonds). The Court of Appeals properly found that the documentary evidence before it and other trial court findings, were sufficient to allow a review by the Court of Appeals of this issue (without returning it to the trial court for specific findings and conclusions). Al-

though the State Law (Oklahoma and elsewhere) fully support the court below, it was merely a matter of reading the plain language of the two contracts. As found by the court below, "As a matter of contract, Winfrey bound Reliance alone."

It should be noted that there are no provisions in the separate Reliance-Insurance Center Agency agreement by which Insurance Center would indemnify Reliance for fraudulent or unauthorized acts of attorneys-in-fact appointed by Reliance. Even if indemnity could be inferred, judgment over would not be proper under the facts and under the findings of both lower courts. *Sinclair Oil & Gas Co.* v. *Brown*, 333 F.2d 967 (10th Cir. 1964); *National Trailer Convoy* v. *Oklahoma Turnpike Authority*, 434 P.2d 238, 241 (Okl. 1967); *Sinclair Prairie Oil Co.* v. *Thornley*, 127 F.2d 128 (10th Cir. 1942).

Petitioner has requested that this Court grant certiorari, and send the action to the State Supreme Court for its determination of abstract questions of law.

The question whether Reliance is entitled to indemnity in this case is basically one of fact. The Court of Appeals found (540 F.2d at p. 495):

> "The trial court specifically found: 'Dennis Winfrey was the agent of Reliance Insurance Co. and had authority and the power to bind Reliance in all material respects in this action.' By giving Winfrey a power of attorney to act for it, Reliance became his principal and Winfrey had power to bind Reliance directly. We have held he succeeded in doing so in this case to the extent of the authority contained in his power of attorney. His authority to execute Reliance bonds came

> from Reliance, not Insurance Center. As a matter of contract, Winfrey bound Reliance alone."

Voluminous other issues were before the trial court and the appellate court, all of which, of course, were involved in the final determination of this cause.

Regardless of the ultimate determination by this Court as to the other portions of the opinion affirming partial judgment against Reliance, this factual determination of agency by the Court of Appeals, under which Reliance is not entitled to indemnity against Insurance Center, should not be a subject for review by this Court, nor is it a proper subject for certified question to the Supreme Court of Oklahoma.

PETITIONER'S AUTHORITIES DISTINGUISHED

Petitioner submits *Victory Carriers, Inc.* v. *United States* (Ct. Clms. 1972), 467 F.2d 1334, and other references in footnotes at page 31 of the Petition, as authority that an agent may be responsible to his principal for unauthorized acts of a sub-agent appointed by the agent.

These cases are clearly distinguishable. These cases deal with a true sub-agent for whom appointing agent may be responsible (under the particular facts in those cases).

It is interesting to note that on pages 14 through 16 of the Petition, Reliance refers to Winfrey's limited powers and limited authority as agent of Reliance. Only with respect to Reliance's claim for indemnity does Winfrey become a non-agent. As found by the court below, "Reliance

then entered a separate agreement with Winfrey and can look only to him to recover its loss" (540 F.2d at p. 495).

To the same effect is 3 Am.Jur.2d, *Agency*, § 514, p. 545, and 43 Am.Jur.2d, *Insurance*, § 162, p. 216.

Here, Winfrey was not a sub-agent of Insurance Center as there was a direct appointment of Winfrey by Reliance as its agent.

CONCLUSION

It is respectfully submitted that Petitioner has failed to establish any special or important reason why the Writ should be granted on the denial of indemnity or judgment over against this Respondent. Petitioner's submitted allegations of fact and law do not support indemnity herein. The Court of Appeals correctly applied the basic law to the established facts.

This Respondent respectfully submits that the "partial validity doctrine," if allowed to stand under the facts of this case, would encourage and reward persons dealing with an agent to ignore known limitations of authority and to disregard warnings and other information which should require reasonable inquiry as to the agent's actual authority.

Here, DeBoer had all of the information before it to determine the bond was unauthorized and invalid. When DeBoer belatedly made inquiry, it was immediately advised by Reliance that the bond was unauthorized and improper (as shown by the power of attorney attached to the bond from the onset). DeBoer is being benefited by the

admitted and found neglect; and, under all the facts, DeBoer was the only one who had the last clear chance to avoid any loss from the acceptance of the unauthorized bond.

This "partial validity doctrine" establishes that something invalid becomes partially valid in equity. Equity has always refused to assist one who, by his own neglect, has caused a loss.

It is basic that one who is knowingly dealing with an agent has the duty and obligation to determine the nature and extent of the agent's authority. One dealing with an agent should not be permitted to cause a loss through his dereliction of duty of reasonable inquiry and then be allowed to recover one-half million dollars from a principal who had no knowledge that a third party was even dealing with the agent.

The indemnity issue is not properly before this Court, and regardless of the action taken to the "partial validity" question, the issue directed toward this Respondent should not be reconsidered by this Court, nor by the Supreme Court of Oklahoma.

Respectfully submitted,

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November, 1976

CERTIFICATE OF SERVICE

I hereby certify that the following named parties,

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required by law to be served in this case, were this day mailed three copies of the foregoing BRIEF OF RESPONDENT, THE INSURANCE CENTER, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, postage prepaid.

Dated: November 24, 1976.

Wm. G. Smith